SPECIFIC PERFORMANCE IN CONNECTION WITH RECEIVERSHIPS

INTRODUCTORY STATEMENT

IN discussing the specific performance of contracts in connection with receiverships it should be noted at the outset that no action for specific performance, or any other action or suit, can be brought against a receiver without the permission of the appointing court or without the authorization of an enabling statute. However, if the third party to a receivership proceeding has what would be a claim for specific performance had not receivership proceedings taken place, and makes a proper presentation of his case to the court appointing the receiver, he may be allowed to press his claim by intervention proceedings or be allowed to sue the receiver for such relief as the situation may require.

Whether such third party shall have the remedy of specific performance or a remedy analogous to specific performance, or whether he simply has a claim for breach of contract, usually depends on the question whether or not the party claiming specific performance of a contract has a lien, charge, equitable or other interest in the receivership property which puts him in a different or better position than other claimants or creditors. The determination of these questions may be complicated by questions of notice and the effect of registry laws.

We must further bear in mind that a lien or charge is, in strictness, neither a *jus in re* nor a *jus ad rem;* that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. The existence of a lien presupposes the property to be in some other person.[1]

The holder of an equity or equitable title in property, on the other hand, has an ownership without the full legal title. An equitable title or interest is a property right and may be such an interest in real estate as will pass to one's heirs, and not pass as

[1] Brace *v.* Duchess of Marlborough, 2 P. Wms. 491 (1728); *Ex parte* John S. Foster, 2 Story (U. S.), 131, 147 (1842); Fed. Cas., No. 4960.

personalty to the executor or administrator.[2] The holder of a lien or charge may have a right to have property in the hands of a receiver sold or otherwise disposed of to satisfy the lienholder's claim, but such a lienholder has not a right of specific performance either against the original owner of the property or against the receiver of such property. The owner of an equitable title or interest in property may have a right of specific performance against the owner of the legal title to such property, and may have a right analogous to specific performance against a receiver of such property.

For the purposes of this article we shall take up:

I. Cases of receivers after judgment to carry the judgment into effect.

II. Receivers after judgment under creditor's bills and by way of equitable execution, as the term is used in England; and receivers in supplementary proceedings and in aid of execution proceedings, as the terms are used in the United States. Such receivers may, by statute, be invested with title.

III. Equitable receivers, who take possession and care for property, but who are not invested with the title to the property.

IV. Receivers in bankruptcy, whose title to property depends upon the uses and rules of equity and also upon the bankruptcy statutes.

V. Liquidators or receivers after dissolution of a corporation, who, by the statutes of England and most of our states, are invested with title to the property of the dissolved corporation.

VI. Specific performance of contracts entered into by the receivers themselves, either as individuals or as officers of the court.

I. RECEIVERS AFTER JUDGMENT TO CARRY THE JUDGMENT INTO EFFECT

Formerly chancery courts enforced their own decrees mainly by writs of sequestration. By such a writ of sequestration the property of the defendant was held by the sequestrator under the order of the court until the defendant performed the decree. To-day receivers are frequently appointed to accomplish what the defendant is ordered to do but refuses. The powers of such receivers are broader than were the powers of sequestrators, and the powers of

[2] See matter discussed in this article, note 15.

the court in appointing receivers are broader than they were under the old writs of sequestration. The statutes in many states provide for the appointment of such receivers.[3] The execution of a conveyance by such a receiver, or the satisfaction of an instrument by such a receiver, are common exercises of such powers.[4]

The right of specific performance in such cases accrues against the defendant and not against the receiver. The court applies the remedy on proper presentation of the case by the plaintiff and uses the receiver as the means to an end. Such appointments of receivers to perform specific acts present and suggest few intricate legal problems. When in other cases a receiver has been appointed for one reason or another and a third party claims specific performance against the receiver, then some intricate legal problems arise.

II. RECEIVERS AFTER JUDGMENT UNDER CREDITORS' BILLS AND BY WAY OF EQUITABLE EXECUTION

After a party has secured a judgment and is unable to satisfy that judgment by execution at law, he may come into a court of equity either for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent sale of defendant's property on execution,[5] or he may ask the aid of a court of equity to obtain satisfaction of his judgment out of the equitable property of the defendant.[6] In either case, a receiver is frequently appointed to accomplish this end for the judgment creditor.

Such receivers are known as receivers under creditor's bills in America, receivers by way of equitable execution in England, and under some state statutes they are called receivers under supplementary proceedings and receivers in proceedings in aid of execution. In all the above cases such receivers are governed by the usages and rules of equity, as in the case of equitable receivers,[7] except, however, as the statutes may change or en-

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[3] NEW YORK CIVIL CODE, § 713 (2); OHIO GEN. CODE, § 11,894 (3); CALIFORNIA CODE OF CIV. PROC., § 564 (3).

[4] Scadden Flat G. M. Co. *v.* Scadden, 121 Cal. 33, 53 Pac. 440 (1898).

[5] Freedman's Savings & Trust Co. *v.* Earle, 110 U. S. 710, 715 (1884); Rice Co. *v.* McJohn, 244 Ill. 264, 270, 91 N. E. 448 (1910).

[6] See references in note 5, *supra*.

[7] See Title III, this article.

large such usages and rules. Such statutes may vest title in the receiver.[8]

Such property goes into the hands of the receiver burdened with all liens, charges, and equitable interests properly attached thereto or existing therein.

In such receiverships the same criterion must hold as holds in ordinary equitable receiverships,[9] namely, has the party demanding specific performance any lien, charge, or equitable interest in or against the property in the hands of the receiver, and furthermore, has such receiver the mere possession of the property, or has he been vested by statute or assignment with title.[10]

III. EQUITABLE RECEIVERS

An equitable receiver is appointed by a court of equity or a court having statutory power to appoint such receiver. General statutes may authorize equitable or other courts to appoint such receivers. Such statutes are found in many states, and are little more than codifications of the ordinary uses of rules of equity authorizing the appointment of such receivers, and governing the conduct of the receivers after appointment. Unless the statute specifically invests such receivers with title,[11] such receivers do not have the full absolute title to the property which comes into their hands. They have, however, possession of such property, and, as one of the English courts puts it, they are the caretakers and the defendants are the owners.[12] Such equitable receivers must be distinguished from liquidators, as they are termed in England, or receivers after dissolution of corporations, as they are termed by the statutes of most of our states. After corporations cease to exist, receivers may be by statute vested with the title to the property of such dissolved corporation.[13] We will consider, with reference to equitable re-

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[8] NEW YORK CIVIL CODE, § 2468.

[9] See Title III, this article.

[10] See Titles II, IV, and V, this article.

[11] Receivers of dissolved corporations are generally vested by statute with title. 2 BIRDSEYE, CONSOL. LAWS OF NEW YORK ANN., 2054, L. 1909, Ch. 28.
Receivers in supplementary proceedings, NEW YORK CIVIL CODE, § 2468.
Receivers of corporations generally, Arkansas, 1904, DIG. OF STAT., chap. 125, § 6348. It is rather unusual for an equitable receiver to be vested with title.

[12] Paterson *v.* Gas Light & Coke Co., [1896] 2 Ch. 476.

[13] See Title V, this article.

ceiverships: (*a*) Contracts concerning land, and (*b*) Contracts not concerning land.

(*a*) Contracts concerning Land

(1) *Rights of Vendee*

When property is placed in the hands of a receiver, we may find that the defendant in the receivership case has made a contract to sell either all or part of his real estate which is in the hands of the receiver. In such a case, what are the rights of the vendee to such a contract? Has the vendee the right to have such contract specifically performed just as if no receivership had taken place? In order to answer this question, it must be first determined what, if any, liens, charges, or equitable interests the vendee has in the property which has been placed in the hands of the receiver by a proper court proceeding. Lord Cranworth, in *Rose* v. *Watson*,[14] says as follows:

"There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of the purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent."

The doctrine declaring that the vendor becomes a trustee for the purchaser is based upon the doctrine of equitable conversion. This doctrine of equitable conversion, or treating the land as belonging to somebody else before it has been actually transferred to that other person, results from a contract which can be specifically performed,[15]

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[14] Rose *v.* Watson, 10 H. L. Cas. 672, 683 (1864).

[15] Edwards *v.* West, 7 Ch. D. 858, 862 (1878).

Mr. Langdell in his Brief Survey of Equity Jurisdiction, page 65, tells us that "Equitable conversion depends upon the intention of the owner of the property, as shown by his making the contract. But this, surely, has nothing to do with the relations between the vendor and the vendee, and consequently nothing to do with the question whether the ownership of the land has passed from the vendor to the vendee. It is a matter entirely between one of the contracting parties and his representatives, and in regard to which the other contracting party neither has any right, nor

so that if there is no specific performance of the contract possible, there is no conversion.[16]

If specific performance of the contract is possible, then the

is subject to any duty." This argument of Mr. Langdell does not carry conviction to our minds, for the following reasons:

If the vendor intends his real estate to pass, at his death, to those who would ordinarily receive only personalty, he may make a will to that effect, but in that event the real estate will not, by the doctrine of equitable conversion, be converted into personalty; it will not go to the executor or administrator at all; it will always be real estate though distributed under the will to those who would take as if it were personalty.

If, on the other hand, the vendor intends to convert the real estate into personalty before he dies so that, at his death, this real estate may pass as personalty to his executors and administrators, then we fail to see how this can be accomplished without the vendor conferring some rights as to this conversion on the vendee, and for the following reasons:

If the deceased has actually converted his real estate so that it will pass, at his death, as personalty, some personalty must be in existence at his death. Personal property must take the shape of tangible movable property or *choses* in actions, claims, etc. If money or other tangible property has taken the place of the real estate, then the transaction is closed and the intention of the deceased has been actually put into effect — there has been a conversion, in fact. If, on the other hand, the transaction has not been closed, what can the vendor have in the shape of personal property to leave to his executors and administrators, unless it be a claim against the vendee?

In order to establish a claim against the vendee, or any one else, it is necessary to have his consent, express or implied, or show such relations between the parties as the law will say establishes a claim. A claim cannot be established against the vendee, or anybody else, merely by the intention of the vendor. The relations between vendor and vendee are expressed by the contract, wherefore the rights or claims of the vendor or the personal property rights which he leaves at his death arise out of and are created by the contract. (Edwards *v.* West, 7 Ch. D. 858, 862 (1878).)

If the vendor has a claim against the vendee, he must have parted with something for that claim. Equity will not give the vendor such a claim unless it gives the vendee something equivalent thereto. Equitable rights and remedies have been invented from time to time for the purpose of doing full justice between parties.

If equity should not give the vendee an equitable interest or title in the land until the time fixed for the performance of the contract or the payment of the full price, then the vendor, dying before the completion of his contract, would die leaving an absolute and complete title to the property. Such property would go to the heirs because no conversion had taken place. But Mr. Langdell admits that conversion has taken place as between the vendor and his representatives. If conversion has taken place, and the heirs get only a bare naked legal title, and the executor or administrator get a right to the purchase money, then we must account for the beneficial title in some one. The vendee is the third party in the triangle and the only one to have the beneficial equitable title, which title is alienable, descendable, and devisable in like manner as real estate held by legal title. Lewis *v.* Hawkins, 23 Wall. (U. S.) 119 (1874).

[16] Edwards *v.* West, 7 Ch. D. 858, 862 (1878); Haynes *v.* Haynes, 1 Dr. & Sm. 426, 432 (1861).

vendee has an equitable estate in the land bargained and sold, at the time the contract is entered into. This proposition is, we believe, supported by reason and by the weight of authority.[17]

If specific performance of the contract of sale is not possible and there is no conversion, what interest, if any, in the property has the purchaser?

If the purchaser has paid his full purchase money and has performed his part of the contract, though he cannot have the property, he has a lien for all the money paid, — why? Because the money was advanced upon the faith of the land, the subject of the contract.[18]

If, on the other hand, the purchaser has only paid part of the purchase money and has performed his part of the contract, though he cannot have the land, he has a lien *pro tanto* for the money paid, — why? Because the money was advanced upon the faith of the land, the subject of the contract.[19]

It has been said that the purchaser not only gets a lien on the land for the amount of purchase money paid, but, in addition, he gets a lien on the land as security for the performance of the vendor's obligation to carry out the contract.[20] This proposition we do not believe to be tenable.[21]

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[17] Paine *v.* Meller, 6 Ves. 349 (1801); Edwards *v.* West, 7 Ch. D. 858, 862 (1878); Eastern Counties Ry. Co. *v.* Hawkes, 5 H. L. Cas. 331, 377 (1855); Secombe *et al.* *v.* Steele, 20 How. (U. S.) 94, 103 (1857); Lewis *v.* Hawkins, 23 Wall. (U. S.) 119 (1874); Laughlin *v.* North Wisconsin Lumber Co., 176 Fed. 772 (1910); Howard *v.* Linnhaven Orchard Co., 228 Fed. 523 (1913).

[18] Rose *v.* Watson, 10 H. L. Cas. 672, 682 (1864).

[19] *Ibid.*

[20] See POMEROY'S EQUITY JURISPRUDENCE, § 1263.

[21] We fail to find adjudicated cases in England or the United States which allow the vendee a lien on the vendor's land as security for the vendor's performing his obligations under the contract (doctrine laid down by POMEROY'S EQUITY JURISPRUDENCE, § 1263), although many cases properly, we think, allow a lien by the vendee for the purchase money paid.

If the vendee is without fault and the vendor is at fault and will not or cannot convey, then the vendee may bring an action in equity for a foreclosure of his lien, *pro tanto*, on the land for the amount paid pursuant to the contract (Rose *v.* Watson, 10 H. L. Cas., 672 (1864); Elterman *v.* Hyman, 192 N. Y. 113, 84 N. E. 937 (1908)). The commencement of such an action is not a rescission of the contract of sale, but an affirmance thereof. (Elterman *v.* Hyman, 192 N. Y. 113, 84 N. E. 937 (1908); Davis *v.* Rosenzweig Realty Co., 192 N. Y. 128, 84 N. E. 943 (1908).)

The difficulties in the way of allowing the vendee a lien on the vendor's land as security for the vendor's performing his obligations under the contract (see POMEROY'S EQUITY JURISPRUDENCE, § 1263) seem to us insurmountable.

Since the vendee's lien for the amounts paid pursuant to the contract is implied in

A receiver takes the property subject to any liens, charges, or equitable interests which exist against the same,[22] for "Equity will not merely enforce the execution of a trust against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of the trust."[23]

If the vendee has paid the full purchase price and done all things agreed by him to be done under the contract of sale to entitle him to a conveyance, and the contract is such a one as can be specifically performed, then he has the full equitable title, and the vendor has the mere naked title in trust for the vendee, the vendor having no beneficial interest therein. A vendee in such a situation, it would seem, should sue the original vendor for specific performance of the contract, making the receiver a codefendant by permission

equity and depends upon the contract, then the vendee loses his lien if he treats the contract as rescinded (Davis *v.* Rosenzweig Realty Co., 192 N. Y. 128, 84 N. E. 943 (1908)). Even if this lien for the definite amounts paid may be created independent of the contract (Davis *v.* Rosenzweig Realty Co., 192 N. Y. 128, 84 N. E. 943 (1908), dissenting opinion), it is another thing to ask equity to impress a lien on the vendor's land or real estate as security for the vendor's performing his obligations.

If we are to insist upon a lien on the land as security for the performance of the obligations of the vendor, when does that lien attach? If it attaches when the contract is made, it must attach under the contract, or as resulting from the contract, or implied in equity from the unexpressed understandings of the parties. But by the contract the parties agree to perform and not to break, and how can equity imply an agreement for a lien covering damages or compensation for failure to perform, when, in fact, the parties actually agree to perform? It is a different thing if, in addition to making the contract, the vendee pays part of the purchase price; then equity may well imply a new agreement by the vendor to give the vendee an interest in the land equal to the payment.

Courts of equity do not, we believe, imply a lien as security for indefinite damages, either in favor of a vendor or a vendee of land. See Brawley *v.* Catron, 8 Leigh (Va.), 522 (1837); Barlow *v.* Delany, 36 Fed. 577 (1888). Says Mr. Pomeroy in regard to the vendor's lien: "There must be a certain, ascertained, absolute debt owing for the purchase price; the lien does not exist in behalf of any uncertain, contingent or unliquidated demand." (POMEROY'S EQUITY JURISPRUDENCE, § 1251.) We believe the same statement may be made with even greater force with reference to the vendee's lien.

The reason why a vendor and vendee of real estate may frequently be given special consideration by courts of equity is that land or real estate cannot ordinarily be duplicated. If, however, the vendee admits or treats the contract as broken or rescinded, then he admits he cannot enforce a right to the property itself. He may have a claim and lien for amounts paid, but as to damages for breach of the contract, which the courts of equity cannot enforce, why should he be in a better or worse position than any other party to a contract which has been breached by the other side?

[22] Black *v.* Manhattan Trust Co., 213 Fed. 692 (1914).

[23] Pooley *v.* Budd, 14 Beav. 34, 44 (1851).

of the appointing court, because, by the appointment of an equitable receiver, such a vendor, whether a natural person or a corporation, would not lose the power to make a conveyance nor lose the right to sue or be sued.

If the plaintiffs to the receivership suit have no lien, equitable or other interest in such property, then the vendee, by intervention in the receivership suit, may ask that such property be released from the order appointing the receiver. If, however, the plaintiffs in the receivership case claim an interest in this property, by lien or otherwise, the court may refuse to release such property from the order appointing the receiver. In such a case the vendee, first having the equitable title, then having acquired the legal title through his suit for specific performance against the vendor, would hold the legal and beneficial title subject to the claims of the parties to the receivership suit, which claims could be worked out through the intervention proceedings of the vendee or by separate suit against the receiver with the court's permission, or by separate suit by the receiver against the vendee, as the situation might warrant.

It may be that the vendee has paid only part of the purchase money; in such a case, the property is taken by the receiver subject to the lien or equitable interest of the vendee, as indicated above. If the time has arrived for his tendering the balance of the purchase price, the vendee, having a lien and a beneficial interest in the property and a right to the legal title by tendering the purchase price,[24] may sue the vendor for specific performance and make the receiver, by permission, a codefendant. In such a situation, it would not be safe for the vendee to pay the balance of the purchase price to the vendor, particularly if the order appointing the receiver ordered the receiver to collect all claims, debts, dues, *choses* in action, etc., outstanding. It would then be the duty of the vendee, upon proper court order, upon receiving a conveyance from the vendor, to pay over the money to the receiver. The court appointing the receiver may or may not release the property, depending upon whether or not the plaintiffs or others claim interests or liens in the same.

Such cases are analogous to the cases wherein a party makes a contract to convey land and dies. The land, by the doctrine of equitable conversion, is considered, at the decease of the vendor,

[24] Reeves *v.* Kimball, 40 N. Y. 299, 305 (1869).

as personalty and goes to his executor or administrator. The vendee sues the heirs to recover the legal title, because they have the legal title, and joins the executor or administrator as parties defendants, because they are entitled to receive the money.

If the situation is such that the vendee's contract could not be specifically performed, then the vendee must fall back on his lien for purchase money paid and work out his claim for breach of contract like any other claimant.

(2) *Rights of Vendor*

When an agreement is entered into to convey land, and the property of the vendee is taken into possession by a receiver, under orders of court, what are the rights and remedies of the vendor if he is ready and willing to perform his contract to convey? If the vendee has a right to specific performance of his contract against the vendor, and the contract is mutual, it follows as a corollary that the vendor has a right to specific performance of the contract against the vendee.[25] Some cases say the vendee is trustee for the purchase money.[26] As against this proposition, it is often said that the vendor may be compensated by a suit in damages for the failure of the vendee to take his property. In answer to this, however, it may be said that such compensation might not be an adequate remedy, that the amount of damage given by a jury might not be the purchase price agreed upon between the parties. In addition to this, the vendor has a right, by contract, to transfer the burdens and liabilities of his property to the vendee.

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[25] Eastern Counties Railway Co. *v.* Hawkes, 5 H. L. Cas. 331, 359 (1855); Old Colony Ry. Corp. *v.* Evans, 6 Gray (Mass.), 25 (1856); Staples *v.* Mullen, 196 Mass. 132, 133 (1907), 81 N. E. 877; Maryland Clay Co. *v.* Simpers, 96 Md. 1, 7, 53 Atl. 424 (1902); Raymond *v.* San Gabriel Val. Land & W. Co. 53 Fed. 883 (1893).

[26] Green *v.* Smith, 1 Atk. 572 (1738); Pollexfen *v.* Moore, 3 Atk. 272 (1745); Toft *v.* Stephenson, 7 Hare, 1 (1848). Mr. Langdell, in his BRIEF SURVEY OF EQUITY JURISPRUDENCE, page 380, tells us that "it is impossible that the purchaser should own the money, either at law or in equity, while it remains in the hands of the purchaser, or that the purchaser should hold any specified money in trust for the seller as such"; that the money is not identified.

If the contract is mutual, we see no reason why the vendor should not have a claim on the purchase money, provided the money or funds have been segregated, set apart and earmarked. Money may be earmarked (Taylor *v.* Plumer, 3 M. & S. 562, 575 (1815); *Ex parte* Cooke, *re* Strachan, 4 Ch. D. 123, 128 (1876)), and the vendee may have divested himself of the whole beneficial interest in a way which could be unmistakably shown. Fourth Street Bank *v.* Yardley, 165 U. S. 634, 644 (1897).

There are two situations which might present themselves in connection with the rights of vendors in receivership: First, when the vendee has paid the full purchase price. In such a case the vendor, desiring to get rid of his real estate, should sue the vendee for specific performance of the contract, joining the receiver as co-defendant by permission of the appointing court. The vendee, whose property is in the hands of the receiver, whether a natural person or a corporation not yet dissolved, has still the power to sue and be sued and to hold property. The vendor, to protect himself in such case, should ask that the receiver be authorized to receive this property; however, the vendor has not a right to have the property forced on the receiver; if burdensome, the court appointing the receiver may refuse to incorporate it in the receivership property.

A second situation may present itself wherein the vendee, whose property is in the hands of the receiver, has paid but part of the purchase price. In such case, the vendor, if ready and willing to convey, may sue the vendee for specific performance of the contract and by permission join the receiver as codefendant because the vendee, by reason of the appointment of a receiver, has not lost his power to sue or be sued, and the vendee may not be insolvent and may not have parted with all his property. The receiver, by taking over the property of the vendee, cannot be compelled to carry out the contracts of the vendee,[27] unless the vendor has an actual equitable interest in certain specified and segregated funds. Funds have not ordinarily the earmarks of real estate, but it is possible to have an equity in funds in the hands of the receiver, if it can be shown that the vendee has given up his absolute ownership of such funds and actually passed a beneficial equitable interest to the vendor.[28] If, however, the receiver believes, by carrying out such contracts, he will benefit the estate, he may ask for an order to carry out such contracts, whether or not the vendor has an actual equitable interest in the funds. If the receiver has not sufficient or no money in his possession belonging to the vendee, he cannot carry out such a contract to purchase land without bor-

[27] *In re* Oak Pits Colliery Co., 21 Ch. D. 322, 330 (1882); Quincy, etc. R. R. Co. *v.* Humphries, 145 U. S. 82 (1891).

[28] *Re* Hallett's Estate, 13 Ch. D. 696 (1879). See Hurley *v.* Atchison, Topeka & Santa Fé Ry., 153 Fed. 503 (1907), affirmed in 213 U. S. 126 (1909). See note 26, *supra*.

rowing money, and even if he has sufficient funds in his possession, the parties to the receivership have certain claims against such funds by reason of their being in the receiver's hands, and if the vendee is insolvent, third parties may also have claims to such funds. Therefore a situation would not frequently arise wherein it would be for the benefit of the estate for the receiver to carry out such a contract.

Even though the vendor have no right to specific performance against the receiver in such case, has he lost his right to specific performance, or its equivalent, against the vendee? Suppose he sue the vendee and get judgment for the full amount of the contract price. The judgment in such case would provide that the vendee shall pay the vendor a certain agreed-upon price upon the vendor's conveying to the vendee the property. The vendee cannot pay if he has parted with all his property to the receiver, and the receiver cannot or will not pay, whereupon the vendor will not convey. If the vendor will not convey, he has not a claim against the vendee for the full amount of the unpaid purchase money. The result of this situation is that, although the vendor may theoretically have a right of specific performance against a vendee, practically he has nothing but an unliquidated claim for damages against the vendee for the vendee's failure to perform the contract. This claim for unliquidated damages the vendor may present in the receivership proceedings by intervention proceedings or otherwise.

If the situation is such that the vendor's contract could not be specifically performed, then the vendor must fall back on his lien or security in the property itself, and, by intervention or other proceedings, free his title from any claim upon it the vendee or his receiver may assert, and assert his claim for breach of contract.

(3) *Other Contracts concerning Land*

Besides contracts between vendor and vendee concerning land, we frequently find other contracts concerning land which may be enforced specifically.

Many of these contracts may ordinarily be specifically performed because the subject of the contract is specific real estate, and courts of equity hold that in such cases it frequently happens that there is no adequate remedy at law, and that it is only equitable that the parties be ordered to specifically perform as agreed upon. If such

contracts are considered in connection with receivership proceedings, the crucial test must be, as stated in the above paragraphs concerning contracts between vendor and vendee, namely, what lien, charge, or equitable interest in the property in the hands of a receiver, if any, have parties claiming specific performance of their agreements? An equitable receiver takes property into his possession and into his care subject to liens, charges, and equitable interests of third parties. If third parties to agreements concerning lands have no lien, charge, or equitable interest in the property they must stand as ordinary creditors and present their claim in the receivership proceedings by intervention or otherwise.

(*b*) Contracts not concerning Land

(1) *Rights of Vendees of Chattels and Securities*

Chattels ordinarily can be duplicated, whereas land cannot. Ordinarily, therefore, courts will not allow specific performance in chattel cases. Where, however, extraordinary conditions present themselves, where it can be shown that damages for breach of contract will not be adequate and complete, and that the chattel or thing to be sold has some peculiar value to the vendee, then the courts are inclined to allow specific performance.[29]

Cases may present themselves where stock has a particular and peculiar value to the vendee of the contract. Because of this peculiar value and because this particular stock cannot be duplicated or secured in the open market, courts may allow specific performance in such a case.[30] The same rule has been applied generally to bills and notes, patents, copyrights, annuities, deeds, bonds, and mortgages.

If a trust or charge of equity has been created covering certain chattels, things, merchandise, or other personal property, then such property goes into the hands of the receiver charged with this trust and subject to this trust, and the vendee may be made whole out of this property.[31]

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[29] Pooley *v.* Budd, 14 Beav. 34 (1851); Buxton *v.* Lister, 3 Atk. 382 (1746); Adderley *v.* Dixon, 1 Sim. & Stu. 607 (1823); Rothholz *v.* Schwartz, 46 N. J. Eq. 477, 19 Atl. 312 (1890); Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 646 (1886); Anderson *v.* Olsen, 188 Ill. 502, 59 N. E. 239 (1901); see Noyes *v.* Marsh, 123 Mass. 286 (1877).

[30] Johnson *v.* Brooks, 93 N. Y. 337 (1883); Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879); Todd *v.* Taft, 7 All. (Mass.) 371 (1863).

[31] Atchison, Topeka & Santa Fé Ry. Co. *v.* Hurley, 153 Fed. 503 (1907), affirmed in 213 U. S. 126 (1909).

If, however, the vendee has no lien, charge, or equitable interest in the property, and the personal property, chattels, stock, etc., have some peculiar value to the vendee, and the purchase price agreed is reasonable and such a price as the personal property could be sold at in the open market, and it could be shown that the exchange of this chattel for the agreed purchase price would be to the best interests of the estate in the hands of the receiver, the vendee may intervene and ask the court to order the receiver to sell the personal property, to receive the purchase price and hold the same for the further orders of the court, and the court may grant such a request. If such personal property has a greater value in the open market than the price agreed upon, and the vendee has no lien, charge or equitable interest upon this property, it would seem that he must come in as ordinary creditors and present his claim for breach of contract. The plaintiff, by having a receiver appointed over this property, has had the same placed in the custody of the court. These proceedings bind the property and hold the same until the final outcome of the suit; and in addition to this, if the defendant is shown to be insolvent, his property will be distributed equitably among his creditors.

(2) *Rights of Vendors of Chattels and Securities*

What are the rights of vendors who have agreed to sell chattels and securities to the vendee, when the vendee's property is put in the hands of a receiver? The reason for giving a vendee a right to specific performance of a contract to sell personal property is because the personal property has a peculiar value and because the remedy at law would not be adequate and complete. It is also stated that rights should be mutual and that, in a case where a vendee has a right to specific performance, the vendor should have the same. This principle may have as much force in the case of personal property, particularly in the case of stock, as it does in the case of real estate; in other words, the owner of stock may be just as anxious to get rid of it and its burdens or liabilities as he would to get rid of real estate and its burdens and liabilities. Therefore, why should a vendor of such personal property not have a right of specific performance against a vendee? Theoretically, he may have such a right; however this may be, a vendor cannot force a receiver to take into his possession property which the court has not ordered

such receiver to take into his possession. The vendor, in such a case, might sue the vendee for specific performance of the contract because the vendee, whether an individual or a corporation, is not civilly dead by reason of the appointment of the receiver over his property. If all the property and money of the vendee has been taken by the receiver, the vendor may not be willing to hand over the personal property, because the vendee cannot pay him the purchase price; in such an event, such a suit by the vendor would be futile. The vendor is therefore relegated to a suit at law for damages against the vendee. After his claim for damages has been liquidated he may present the same to the receiver and share in the distribution of the unsecured assets.

(3) *Personal Service Contracts*

Personal service contracts may be divided into two kinds: first, those in which service is agreed to be performed by the party whose property goes into the hands of the receiver; second, service agreed to be performed by a third party for a party whose property goes into the hands of a receiver.

In the first case, where the taking of the property does not prevent the individual from performing this service, the third party still has a right to sue the defendant but not for specific performance, because courts cannot supervise individuals and make them perform,[32] and they cannot enforce agreements strictly personal in their nature, so long as there is no property the right to which is taken away from the person complaining.[33] When such a contract of service covers property which has gone into the hands of a receiver, and a third party complains his property right has been taken away, what are the rights of this third party? The individual whose property is placed in the hands of a receiver cannot perform by reason of the receivership; nevertheless, because of his failure to perform, the party not in default may have a claim for damages against him.[34] This claim, when liquidated, may be presented

[32] Kirchner & Co. *v.* Gruban, [1909] 1 Ch. 413. See note 33, *infra*.

[33] In Rigby *v.* Connol, 14 Ch. D. 482, 487 (1880).

[34] If a receiver is appointed of a corporation this is considered by some courts a *vis major* which prevents recovery for breach of contract. People *v.* Globe, 91 N. Y. 174 (1883); Malcomson *v.* Wappoo Mills, 88 Fed. 680 (1898). Contrary doctrine, Spader *v.* Manufacturing Co., 47 N. J. Eq. 18, 20 Atl. 387 (1890); Rosenbaum *v.* Credit System Co., 61 N. J. L. 543, 40 Atl. 591 (1898); Isaac McLean Sons Co. *v.* William S. Butler & Co., 227 Fed. 325 (1914).

against the assets in the hands of the receiver. Specific performance of the contract, however, cannot be claimed or had against the receiver, because such specific performance would be a form of satisfaction or payment which the receiver cannot be required to make.[35] In case, however, the third party has a lien, charge, or equitable interest in the property in the hands of the receiver, even in that case he cannot have specific performance against the receiver, but he may, by intervention proceedings or otherwise, have such property released from the receivership or returned to him, as the case may be, but he has not a right to have the receiver perform the contract.

(4) *Other Contracts not concerning Land*

There may be other contracts not concerning land which are not covered by the three subdivisions above, and contracts which may normally be specifically performed. In case of receivership, the same criterion must hold, namely, has the party demanding specific performance any lien, charge, or equitable interest in property in the hands of the receiver?

IV. RECEIVERS IN BANKRUPTCY

From the moment the petition in bankruptcy is filed, the sovereignty constructively takes possession of the alleged bankrupt's property for equitable distribution among his creditors.[36]

The English bankruptcy statute provides for an interim receiver, an official receiver, and a trustee in bankruptcy. An interim receiver is appointed at any time after the presentation of the bankruptcy petition and before a receiving order is made. He has the powers of a receiver and manager appointed by the high court of judicature, meaning that he has the powers of a so-called equitable receiver. An official receiver has the powers and duties set out in the bankruptcy act and the trustee is vested with the estate, and the bankrupt is divested of the estate and the title.

The United States Bankruptcy Act provides for the appointment of a receiver, who has much the same powers as the English interim

[35] Express Co. *v.* Railroad Co., 99 U. S. 191 (1878); Union Trust Co. *v.* Curtis, 182 Ind. 61, 105 N. E. 562 (1914); Brown *v.* Warner, 78 Texas, 543, 14 S. W. 1032 (1890).

[36] *In re* Benedict, 140 Fed. 55, 59 (1905); In the Matter of Estate of Joseph Diamond, 16 Ohio L. Rep. 515 (1918); Acme Harvester Co. *v.* Beekman Lumber Co., 222 U. S. 300 (1911).

receiver, namely, the powers of an ordinary equitable receiver, but he cannot sell or dispose of the property unless it is perishable. A sale or other disposal of the property of the bankrupt should ordinarily be accomplished by the trustee. The receiver has no title to the bankrupt's property — is a mere temporary custodian. The trustee in bankruptcy, however, is vested with the property of the bankrupt.

Receivers in bankruptcy and trustees in bankruptcy, under both the American and the English acts, take the property of the bankrupt subject to all liens, charges, and equitable interests properly attaching to the same, except such as attach within a definite time preceding the bankruptcy proceedings, and are thereby void or voidable.[37] A third party, therefore, who would be entitled to a specific performance of the contract against the alleged bankrupt, had not bankrupt proceedings intervened, would still have what would be, in substance, such a claim against the property in the hands of the bankrupt, provided he had against such property a lien, charge, or equitable interest.[38] If such third party attempted to work this out by intervention proceedings, or otherwise, in the bankruptcy court during the interim receiver's administration of the estate under the English act, or a receiver's administration under the American act, and a deed of the property were necessary to complete the transaction, a difficult problem would present itself. The alleged bankrupt has been divested of his property by reason of the proceedings in bankruptcy, the receiver has custody of the same, but the title to the property has not yet vested in the trustee. Whatever order the third party might acquire ordering the receiver to hand over the property or releasing the property from the bankruptcy proceedings, an additional deed or acquittance might in safety be secured later from the trustee in bankruptcy, because the title which the trustee in bankruptcy acquires dates back to the time of adjudication.[39] A summary proceeding may not

[37] *Ex parte* Holthausen, *In re* Scheibler, L. R. 9 Ch. 722 (1874); Thompson *v.* Fairbanks, 196 U. S. 516, 526 (1905); Yeatman *v.* Savings Institution, 95 U. S. 764, 766 (1877).

[38] Harris *v.* Truman & Co., 9 Q. B. D. 264 (1882); *Ex parte* Holthausen, *In re* Scheibler, L. R. 9 Ch. 722 (1874); Pearce *v.* Bastable's Trustee, [1901] 2 Ch. 122; *Ex parte* Rabbidge, 8 Ch. D. 367, 370 (1878); Thompson *v.* Fairbanks, 196 U. S. 516, 526 (1905).

[39] English Bankrupt Act, ENG. STAT., [1914] 322, § 53; American Act of Bankruptcy, 30 STAT. AT L. 565, § 70 (1898).

be sufficient to adjudicate rights of the trustee or an adverse claimant; a plenary suit may be necessary.[40] A trustee in bankruptcy is vested with the property and title of the bankrupt's estate by statute, somewhat as a liquidator or receiver after dissolution of a corporation is vested with the title of the corporation. Having the legal title to the property he may be compelled to convey to one who has contracted to purchase from the bankrupt vendor.[41] The courts have held, however, that specific performance cannot be decreed against the trustee of a bankrupt purchaser,[42] and correctly we believe, provided it cannot be shown that the vendor had an equitable or legal interest in funds of the purchaser segregated and set apart and earmarked, and that the purchaser had unmistakably divested himself of the whole beneficial interest in said funds.[43]

V. LIQUIDATORS OR RECEIVERS TO DISSOLVE CORPORATIONS

The distinction between liquidators or receivers to dissolve corporations and ordinary equitable receivers is in the fact that equitable receivers are custodians or caretakers of the property in their hands, whereas liquidators and receivers, after dissolution of corporations, are vested by statute with title to the dissolved corporation and frequently have statutory powers and duties. The same usages and rules of equity which obtain in the case of specific performance being demanded against equitable receivers, or against the property in the hands of equitable receivers, obtain against liquidators or receivers after dissolution of the corporation,[44] with the above distinction. If a contract is entered into with a corporation and it is dissolved, the corporation cannot perform this contract, neither can it, strictly speaking, according to the old law, as such, be liable for breach of contract to perform, because no corporation any longer exists. Yet the party not in fault may have a right of action against the statutory survivors of the corporation.[45] Proceedings, therefore, should be instituted against the receiver or liquidator having title to this property. Such a receiver could make any deed necessary

[40] Dreyer *v.* Perkins, 217 Fed. 889 (1914).

[41] See cases under note 38.

[42] Pearce *v.* Bastable's Trustee in Bankruptcy, [1901] 2 Ch. 122, 125.

[43] See note 26.

[44] *In re* Oak Pits Colliery Co., 21 Ch. D. 322 (1882).

[45] See Personal Service Contracts, this article.

and at the same time turn over or give possession of the property. The statutes in such cases largely control, because they permit the corporation to continue after dissolution for the purpose of being sued and for winding up their business, or may by statute designate the directors as trustees for winding up the business, in which cases it may be necessary to sue the directors to have them make the proper deed, and it may be necessary to intervene in the receivership, and sue the receiver, and have the court appointing the receiver order the receiver to give possession or hand over the property.

VI. SPECIFIC PERFORMANCE OF CONTRACTS ENTERED INTO BY RECEIVERS THEMSELVES

Receivers, particularly those appointed to manage or carry on a business, frequently enter into contracts which are independent of the executory contracts which they find existing when the receivers take hold.

The English courts hold that receivers, in entering into such contracts, do so as individuals and are personally responsible and liable for such contracts, although, if such contracts are properly and legally entered into, the receivers may be indemnified out of the assets of the trust estate.[46] Our American courts, on the other hand, hold generally that receivers, when they enter into such contracts, are officially liable.[47]

If, under the English rule, a receiver enters into a contract which might ordinarily be specifically performed, it might be enforced against him as well as against another individual, unless such contract involved property which was *in custodia legis*. In the latter event, no order by any court other than the appointing court could disturb the property in the hands of the receiver. If a third party, however, presents claims which are valid and just and growing out of the receiver's contracts, he must depend upon the court's seeing that such obligations of the receiver are scrupulously carried out, so far as the court has funds in its hands.[48]

Such third party, strictly speaking, gets no lien against the property.

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[46] Burt, Boulton & Hayward *v.* Bull, [1895] 1 Q. B. 276.

[47] McNulta *v.* Lochridge, 141 U. S. 327, 332 (1891).

[48] *In re* London United Breweries, Ltd., [1907] 2 Ch. 511.

If, under the American rule, a receiver enters into a contract under his express or implied power, and such a contract does not involve property in the hands of a receiver, the third party to such a contract can only intervene or sue the receiver officially by permission of the appointing court. If the third party gets judgment in another court, this judgment can only be satisfied out of the property in the hands of the receiver by permission of the appointing court.

If such a receiver officially makes a contract involving property in the hands of the receiver, no court can order such property to be specifically handed over to the third party, except the appointing court; therefore the third party's remedy is to intervene or to ask for permission to sue the receiver, and ask for an order authorizing the receiver to turn over the property to such party. The American courts hold that in the case of a contract entered into officially by a receiver, "The Court in a substantial sense makes the contract."[49] "Judicial repudiation of obligations is not to be sanctioned under any conditions," — therefore, a party to a contract with a receiver must depend upon the honor of the court to carry out such a contract, but he cannot force the court to do so by a proceeding of specific performance of contract, nor can he secure damages from the court for its or the receiver's failure to carry out the contract. A claim growing out of a receiver's operation of the property is not, strictly speaking and in the full meaning of the word, a lien on the property, but may be a preferential debt.[50]

If the receiver, either under the English or American rule, enters into a contract without the authorization of the court, either express or implied, then he must do so as an individual and be liable as an individual.

If a receiver, by order of court, enters into a contract to sell property to a third party, this third party becomes, by his bid, a party or quasi party to the suit and is amenable to the court's orders.[51] If this third party fails to carry out his contract, the receiver may sue him for specific enforcement,[52] or proceed summarily

[49] Atlantic Trust Co. *v.* Chapman, 208 U. S. 360, 371 (1908).

[50] Bank of Commerce *v.* Central C. & C. Co., 115 Fed. 878, 880 (1902).

[51] Gordon *v.* Saunders, 2 McCord Ch. (S. C.) 151, 167 (1827); Deaderick *v.* Smith, 6 Humph. (Tenn.) 138, 146 (1845); Rice *v.* Ahlman, 70 Wash. 12, 126 Pac. 66 (1912); Majors *v.* McNeilly, 7 Heisk. (Tenn.) 294 (1872).

[52] Bowne *v.* Ritter, 26 N. J. Eq. 456 (1875).

against him for his failure to carry out the contract.[53] If, on the other hand, the receiver fails to carry out his contract, what are the third party's rights? In the first place, the sale made by the receiver is subject to confirmation by the court, and the purchaser may make any motion or file any petition necessary to protect his rights; he may also be given the right to appeal or go to a higher court on writ of error.[54] When a sale is confirmed, the title to personalty so sold becomes vested in the purchaser without formal decree and without any bill of sale or other conveyance by the receiver. In sales of realty, a confirmation of the sale does not vest the title in the purchaser; it only completes the sale. The title must be completed in the purchaser by a formal deed. If the receiver fails or refuses to make a deed or other proper conveyance, the bidder's remedy is to apply for relief to the court appointing the receiver; such a bidder has no right to sue the receiver for specific performance, unless the appointing court should determine that the rights of the parties could not be adequately presented in a summary proceeding, and therefore authorize a suit for specific performance against the receiver.[55]

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[53] Bowne *v.* Ritter, 26 N. J. Eq. 456 (1875).

[54] Majors *v.* McNeilly, 7 Heisk. (Tenn.) 294 (1872).

[55] Dreyer *v.* Perkins, 217 Fed. 889 (1914).